

PORTUGUESE DEFIANCE: ANALYZING THE  
STRENUOUS RELATIONSHIP BETWEEN DRUG  
DECRIMINALIZATION AND INTERNATIONAL  
LAW

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INTRODUCTION

Drugs are bad. Well, maybe drugs are not all necessarily bad, as many have widely recognized scientific and medical benefits.<sup>1</sup> The harmful

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1. See Single Convention on Narcotic Drugs pmbl., *opened for signature* Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 151, *as amended by* Protocol Amending the Single Convention on Narcotic Drugs, 1961, *opened for signature* Mar. 25, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3 [hereinafter 1961 Convention]; Convention on Psychotropic Substances pmbl., Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 [hereinafter 1971 Convention].

health effects and addictions caused by drug abuse, however, are certainly bad. The word “drugs,” as used in this Article, refers to narcotic and psychotropic substances.<sup>2</sup> Advertisements by public service campaigns frequently advise people not to do drugs.<sup>3</sup> Children are told not to do drugs through anti-drug education programs in schools.<sup>4</sup> Of course, it is easy to just advise people not to do drugs; but simply educating about the harmful effects of drugs does not always deter drug abuse.<sup>5</sup> Many people are exposed to certain factors and pressures in their lives that can push them to abuse drugs despite knowing the potential health risks.<sup>6</sup> Other people may choose to abuse drugs simply because they enjoy getting high, and do not particularly care about the effect it may have on their health.

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2. Although the term “narcotic” has a literal meaning of “inducing stupor or sleep,” in this context the term covers those substances designated as “drugs” under the 1961 Convention “whether or not they induce sleep or stupor.” U.N., COMMENTARY ON THE SINGLE CONVENTION ON NARCOTIC DRUGS, 1961, at 9–10, U.N. Sales No. E.73.XI.1 (1973). A “psychotropic substance” refers to “any substance that ‘has the capacity to produce: 1) A state of dependence, and 2) Central nervous system stimulation or depression[,] resulting in hallucinations or disturbances in motor function or thinking or behavior or perception or mood,’ or similar abuse and ill effects as a” substance previously designated as a “psychotropic substance” under the 1971 Convention. Brian A. Ford, *From Mountains to Molehills: A Comparative Analysis of Drug Policy*, 19 ANN. SURV. INT’L & COMP. L. 197, 204 (2013) (quoting 1971 Convention, *supra* note 1, art. 2).

3. See *About Us*, P’SHP FOR DRUG-FREE KIDS, <http://www.drugfree.org/about/about-us/> (last visited Oct. 16, 2015) (stating that anti-drug public service announcements by the Partnership for Drug-Free Kids (formerly known as the Partnership for a Drug-Free America) “make up the largest single-issue public service campaign in advertising history”).

4. Such programs include the US-based DARE (Drug Abuse Resistance Education) program, which was implemented in public schools across the US and has had no demonstrated effectiveness in reducing drug abuse. A REPORT ON GLOBAL ILLICIT DRUG MARKETS 1998–2007, at 13 (Peter Reuter & Franz Trautmann eds., 2009) [hereinafter GLOBAL ILLICIT DRUG MARKETS 1998–2007], available at [http://ec.europa.eu/justice/anti-drugs/files/report-drug-markets-short\\_en.pdf](http://ec.europa.eu/justice/anti-drugs/files/report-drug-markets-short_en.pdf).

5. See REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2004, ¶ 8, U.N. Doc. E/INCB/2004/1, U.N. Sales No. E.05.XI.3 (2005) [hereinafter INCB REPORT 2004].

6. See REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2014, ¶ 25, U.N. Doc. E/INCB/2014/1, U.N. Sales No. E.15.XI.1 (2015) (discussing socioeconomic factors that have an impact on the demand for illicit drugs).

Drug abuse is a global issue that transcends cultures and political boundaries.<sup>7</sup> As a result of this pervasive problem, every country in the world has adopted some sort of drug-control law.<sup>8</sup> Generally, the purpose of these laws is to protect people against the detrimental health effects of potentially harmful substances.<sup>9</sup> During the second-half of the twentieth century, three UN conventions on drug policy were created to form an international strategy against the global drug problem.<sup>10</sup> Almost every Member State of the UN has pledged their commitment to addressing the problem by signing the three UN Drug Conventions.<sup>11</sup> Most countries have interpreted the treaties to prohibit any non-medical or non-scientific use of drugs, and to require criminal sanctions to punish any person found possessing or using drugs for any non-medical or non-scientific purpose, including for personal consumption.<sup>12</sup>

However, despite governmental actions, drug-related problems continue to persist throughout the world. According to a report by the UN, it was estimated that in 2013 there were about 27.4 million people worldwide with drug abuse problems,<sup>13</sup> and somewhere between 98,000 and 231,400 drug-related deaths.<sup>14</sup> Moreover, it was estimated that 1.65 million (about 13.5% of) people who took drugs by injection had HIV.<sup>15</sup> Drug-related crimes continue to increase, even while other types of

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7. See *id.* ¶¶ 269–684 (analyzing drug problems affecting various regions of the world).

8. Harry G. Levine, Commentary, *Global Drug Prohibition: Its Uses and Crises*, 14 INT'L J. DRUG POL'Y 143, 145 (2003).

9. See, e.g., Controlled Substances Act, 21 U.S.C. § 801 (1970).

10. See Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 1582 U.N.T.S. 95 [hereinafter 1988 Convention]; 1971 Convention, *supra* note 1; 1961 Convention, *supra* note 1.

11. See Ford, *supra* note 2, at 201 n.10.

12. See Caitlin Elizabeth Hughes, *Overcoming Obstacles to Reform? Making and Shaping Drug Policy in Contemporary Portugal and Australia* 36 (Oct. 2006) (unpublished Ph.D. dissertation, University of Melbourne) (on file with Minerva Access, University of Melbourne), available at [https://minerva-access.unimelb.edu.au/bitstream/handle/11343/39229/67255\\_00003215\\_01\\_Caitlin\\_Hughes\\_Thesis.pdf?sequence=1](https://minerva-access.unimelb.edu.au/bitstream/handle/11343/39229/67255_00003215_01_Caitlin_Hughes_Thesis.pdf?sequence=1).

13. U.N. OFFICE ON DRUGS & CRIME, WORLD DRUG REPORT 2015, at ix, U.N. Sales No. E.15.XI.6 (2015) [hereinafter UNODC WORLD DRUG REPORT 2015].

14. *Id.* at 11.

15. *Id.* at ix.

crime, including property-related and violent crimes, have declined.<sup>16</sup> These trends have led many commentators and government officials to conclude that drug laws have been a complete failure.<sup>17</sup>

Among all of the disappointing figures, however, lies a glimmer of hope; a beacon of light shining from a place that has struggled with the darkest problems stemming from drug abuse. There is a country that had lost faith in the effectiveness of the typical modern drug regime and took a path that many had seen as counter-intuitive.<sup>18</sup> Rather than following the status quo of trying to deter drug abuse through the threat of criminal penalties, a nation suffering from high rates of drug addiction and HIV decided to take a more sympathetic approach towards its citizens.<sup>19</sup> This country, located on the southwest tip of Europe, has caught the attention of observers from around the world with its unconventional method of dealing with illegal drug use. In 2001, Portugal implemented a revolutionary approach to the drug crisis by decriminalizing the possession of illegal drugs for personal use,<sup>20</sup> and, over a decade later, the decriminalization scheme has proven to be impressively successful.<sup>21</sup>

What can the rest of the world learn from Portugal's experience? Drug policies that are more effective in reducing harms caused by illicit

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16. U.N. OFFICE ON DRUGS & CRIME, WORLD DRUG REPORT 2014, at xii, 19, U.N. Sales No. E.14.XI.7 (2014) [hereinafter UNODC WORLD DRUG REPORT 2014].

17. Matthew S. Jenner, Note, *International Drug Trafficking: A Global Problem with a Domestic Solution*, 18 IND. J. GLOBAL LEGAL STUD. 901, 909 (2011).

18. See Maia Szalavitz, *Drugs in Portugal: Did Decriminalization Work?*, TIME (Apr. 26, 2009), <http://content.time.com/time/health/article/0,8599,1893946,00.html>.

19. See Kellen Russoniello, Note, *The Devil (and Drugs) in the Details: Portugal's Focus on Public Health as a Model for Decriminalization of Drugs in Mexico*, 12 YALE J. HEALTH POL'Y L. & ETHICS 371, 380–85 (2012).

20. Decreto-Lei 30/2000 [Decree Law 30/2000], Diário da República de 29.11.2000 (Port.) [hereinafter Decreto-Lei 30/2000]; see also EUR. MONITORING CTR. FOR DRUGS & DRUG ADDICTION, DRUG POLICY PROFILES: PORTUGAL 16–17 (2011) [hereinafter DRUG POLICY PROFILES: PORTUGAL], available at [http://www.emcdda.europa.eu/system/files/publications/642/PolicyProfile\\_Portugal\\_WEB\\_Final\\_289201.pdf](http://www.emcdda.europa.eu/system/files/publications/642/PolicyProfile_Portugal_WEB_Final_289201.pdf).

21. See EU COMM., THE EU DRUGS STRATEGY, 2010–12, H.L. 270, ¶ 117 (U.K.), available at [http://ec.europa.eu/dgs/secretariat\\_general/relation/relation\\_other/npodocs/united\\_kingdom/own\\_initiative/oi\\_eu\\_drugs\\_strategy/oi\\_eu\\_drugs\\_strategy\\_lords\\_opinion\\_en.pdf](http://ec.europa.eu/dgs/secretariat_general/relation/relation_other/npodocs/united_kingdom/own_initiative/oi_eu_drugs_strategy/oi_eu_drugs_strategy_lords_opinion_en.pdf).

drug use and addiction may differ from the international norm. In order to encourage countries to adopt more effective drug policies, international law should permit countries to pursue creative approaches that may include removing the threat of criminal prosecution for drug offenses. Countries should be allowed to focus efforts on reducing drug addiction through treatment, rehabilitation, and social reintegration.

This Article focuses mainly on policies regarding drug use and possession for personal consumption. These will often be referred to throughout this Article as “minor drug offenses.” Other drug policy subjects, such as trafficking and distributing, are not particularly considered here. This Article also does not discuss the legalization of minor drug offenses. Rather, the focus of this Article is on Portugal’s success with decriminalization, how it fits within the current international legal framework for drug control, and whether changes should be made to current international law in order to better accommodate decriminalization policies. Section I of this Article discusses the current international drug regime by examining the three drug-related UN treaties and their effectiveness in combatting the global drug problem. Section II explains Portugal’s unique drug policy and analyzes its effectiveness. Section III discusses decriminalization in the international context and argues for a change in the current international drug control policy.

## I. INTERNATIONAL DRUG LAW

Three UN treaties comprise the international drug policy framework: the Single Convention on Narcotic Drugs of 1961, the Convention on Psychotropic Substances of 1971, and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (often referred to collectively as “the UN Drug Conventions”).<sup>22</sup> Nearly every

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22. See U.N. OFFICE ON DRUGS & CRIME, THE INTERNATIONAL DRUG CONTROL CONVENTIONS, at 1, U.N. Sales No. E.09.XI.20 (2009). See *Treaties*, U.N. OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/treaties/> (last visited Mar. 11, 2016), for the text of the three treaties online.

country in the world is a Party to at least one of these treaties.<sup>23</sup> These three treaties are the foundation of an international drug regime that calls for criminal penalties to punish drug offenses including possession.<sup>24</sup>

This section of the Article focuses on international law regarding drug-control. Part A will present the general history and background of the UN Drug Conventions that currently govern international drug policy. Part B details the penal provisions of the treaties dealing with drug possession. Part C of this section discusses the effectiveness of the current international drug regime.

### A. History and Background of the Treaties

The current international drug control scheme began with the Single Convention on Narcotic Drugs of 1961 (1961 Convention),<sup>25</sup> which replaced previous international treaties on drug policy.<sup>26</sup> The Preamble of the 1961 Convention provides that Parties recognize “that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,” and that the Parties have a “duty to prevent and combat this evil.”<sup>27</sup> Over a hundred different substances are subject to controls under the 1961 Convention,<sup>28</sup> with opium, cocaine, and marijuana receiving the most restrictions.<sup>29</sup> The drugs that come under the control of the 1961 Convention are categorized into four different “Schedules” on the basis of how addictive

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23. See *UN Conventions on Drug Control*, INT’L DRUG POLICY CONSORTIUM, <http://idpc.net/policy-advocacy/global-advocacy/global-drug-control-system/un-conventions-drug-control> (last visited Mar. 11, 2016). There are 193 member States of the UN. *Growth in United Nations Membership, 1945–Present*, UNITED NATIONS, <http://www.un.org/en/members/growth.shtml> (last visited Mar. 19, 2015). Of those, 184 are Parties to the Single Convention on Narcotic Drugs of 1961. *UN Conventions on Drug Control*, *supra*. One hundred eighty-three are Parties to the Convention on Psychotropic Substances of 1971. *Id.* One hundred eighty-nine are Parties to the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. *Id.*

24. See Ford, *supra* note 2, at 201.

25. See *id.* at 203.

26. 1961 Convention, *supra* note 1, art. 44.

27. *Id.* pmbl.

28. *Id.* scheds. I–IV.

29. *Id.* art. 2.

the substance is perceived to be.<sup>30</sup> The aim of the 1961 Convention is to limit the use of the identified drugs to medical and scientific purposes.<sup>31</sup> To meet this goal, the 1961 Convention places an obligation on Parties to adopt legislative and administrative measures necessary “to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.”<sup>32</sup>

The main strategy of the 1961 Convention has been described as a “supply-side” approach towards disrupting the international drug trade.<sup>33</sup> This approach focuses on targeting suppliers of narcotics in order to keep the drugs from being available on the international market.<sup>34</sup> It does this by requiring Parties to create state-controlled monopolies on the production and trade of narcotic drugs.<sup>35</sup> However, even though the main strategy of the 1961 Convention is to control the supplies of narcotics, the Convention also seeks to deter consumer demand by requiring Parties to treat “possession” as a punishable offense.<sup>36</sup> This prohibition on “possession” will be further discussed in the following subsection.

In order for a narcotic drug to come under the control of the 1961 Convention, both the World Health Organization (WHO) and the Commission on Narcotic Drugs (Commission) must take action.<sup>37</sup> The WHO determines whether a substance is potentially dangerous and prone to abuse, and then makes a recommendation to the Commission if it determines that the substance should be listed in one of the schedules.<sup>38</sup> The Commission may choose whether or not to implement the recommendation of the WHO.<sup>39</sup>

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30. Daniel Heilmann, *The International Control of Illegal Drugs and the U.N. Treaty Regime: Preventing or Causing Human Rights Violations?*, 19 CARDOZO J. INT’L & COMP. L. 237, 244 (2011).

31. 1961 Convention, *supra* note 1, pmb1.

32. *Id.* art. 4(c).

33. Ford, *supra* note 2, at 203.

34. *See id.*

35. 1961 Convention, *supra* note 1, arts. 29–31.

36. *Id.* arts. 33, 36.

37. *Id.* art. 3.

38. *Id.*

39. *Id.*

In the years following the creation of the 1961 Convention, technical advances in manufacturing led to an increase in the production and use of synthetic drugs and chemically produced psychotropics.<sup>40</sup> This resulted in new mass global markets for substances such as amphetamines, barbiturates, and hallucinogens.<sup>41</sup> Because the 1961 Convention did not contemplate psychotropic drugs, the Commission was unable to conclude that the treaty was applicable to these substances.<sup>42</sup> The international community, however, believed that these drugs should be placed under controls similar to those provided in the 1961 Convention.<sup>43</sup>

The Commission responded by drafting the Convention on Psychotropic Substances of 1971 (1971 Convention).<sup>44</sup> The 1971 Convention is similar to the 1961 Convention in that it prohibits the manufacture, production, trade, possession, and use of covered substances for non-scientific and non-medical purposes.<sup>45</sup> However, the 1971 Convention gives the Commission greater discretion in determining which substances should be controlled.<sup>46</sup> Together these treaties created a general prohibition over a broad range of drugs for any purpose other than medical or scientific use.<sup>47</sup>

In the early 1980s, despite the controls implemented in the 1961 and 1971 Conventions, “drug abuse and illicit traffic had reached unprecedented dimensions.”<sup>48</sup> The UN General Assembly responded by

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40. Julia Buxton, *The Historical Foundations of the Narcotic Drug Control Regime*, 23 (The World Bank, Policy Research Working Paper No. 4553, 2008).

41. *Id.*

42. See E.S.C. Res. 1969/1401 (XLVI), U.N. Doc. E/RES/1969/1401 (XLVI) (June 5, 1969).

43. See *id.*

44. See *id.*; 1971 Convention, *supra* note 1, pmbl.

45. Compare 1971 Convention, *supra* note 1, arts. 5, 7 (limiting the use of substances covered by the Convention to medical and scientific purposes), with 1961 Convention, *supra* note 1, art. 4(c) (obligating Parties “to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs”).

46. See Heilmann, *supra* note 30, at 247.

47. See 1961 Convention, *supra* note 1, arts. 2, 4, 36; 1971 Convention, *supra* note 1, arts. 2, 5, 7, 22.

48. U.N., COMMENTARY ON THE UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES 1988, at 1, U.N. Doc.



recommending that the Commission draft a new convention.<sup>49</sup> The Commission's efforts resulted in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (1988 Convention).<sup>50</sup> The 1988 Convention reinforced the controls laid down in the previous Conventions by requiring tougher penalties, including the criminalization of drug use and possession.<sup>51</sup> The 1988 Convention expands the UN's drug control strategy by emphasizing a demand-side approach in addition to the supply-side approach taken by the previous conventions.<sup>52</sup> Together, the 1961 Convention, the 1971 Convention, and the 1988 Convention have reigned as the foundation of international drug policy for over two-and-a-half decades.

## B. Penal Provisions for Possession

All three of the UN Drug Conventions prohibit the possession of drugs, and each contains provisions regarding penalties for violations. Article 33 of the 1961 Convention requires the Parties to prohibit "the possession of drugs except under legal authority."<sup>53</sup> Article 36(1)(a) of the 1961 Convention goes on to list "possession" as one of several actions that Parties are required to "ensure . . . shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other

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E/CN.7/590, U.N. Sales No. E.98.XI.5 (1988) [hereinafter COMMENTARY ON THE 1988 CONVENTION].

49. See Draft Convention Against Traffic in Narcotic Drugs and Psychotropic Substances and Related Activities, G.A. Res. 39/141, U.N. Doc. A/RES/39/141 (Dec. 14, 1984).

50. See 1988 Convention, *supra* note 10, pmbl.

51. See *id.* art. 3. The penalty provisions are discussed further in Section I.B. of this Article.

52. David P. Stewart, *Internationalizing the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 18 DENV. J. INT'L L. & POL'Y 387, 402-03 (1990). See also 1988 Convention, *supra* note 10, pmbl. Article 14 requires Parties to take "measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances." *Id.* art. 14(4). Most importantly for purposes of this discussion, the 1988 Convention also aims to reduce demand by criminalizing "possession, purchase or cultivation" for personal use. *Id.* art. 3(2).

53. 1961 Convention, *supra* note 1, art. 33.

penalties of deprivation of liberty.”<sup>54</sup> However, the 1961 Convention was amended in 1972 by a Protocol that added sub-paragraph (1)(b),<sup>55</sup> which provides that “when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38.”<sup>56</sup> The first paragraph of article 38 requires Parties to “give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall co-ordinate their efforts to these ends.”<sup>57</sup> The penal provisions in the 1971 Convention are identical to those in the 1961 Convention.<sup>58</sup>

These provisions require Parties not to legally permit the possession of controlled substances (for non-medical and non-scientific purposes). But, because treatment, rehabilitation, and other similar actions, may be used as alternatives to punishment under these provisions, the 1961 and 1971 Conventions do not necessarily require that possession by drug abusers be treated as a criminal offense.<sup>59</sup>

The 1988 Convention takes a stronger stance against possession of controlled substances.<sup>60</sup> Article 3(2) of the 1988 Convention provides:

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54. *Id.* art. 36.

55. 1961 Convention, *supra* note 1, art. 14(1)(b).

56. *Id.* art. 36(1)(b).

57. *Id.* art. 38(1).

58. *See* 1971 Convention, *supra* note 1, arts. 20, 22.

59. Russoniello, *supra* note 19, at 379 n.23.

60. *See* 1988 Convention, *supra* note 10, art. 3(2).

Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.<sup>61</sup>

This language has been interpreted as “clearly requir[ing] parties to criminalize” possession of drugs for personal consumption, rather than treating such an act merely as a “punishable offence” as required by the previous conventions.<sup>62</sup> Obligating Parties to treat possession for personal consumption as a criminal offense is significant because it causes the Parties’ criminal justice systems to be responsible for handling cases of minor drug offenses.<sup>63</sup> Problems arising from the language of article 3(2) will be discussed in further detail below.

Although article 3(2) obligates Parties to treat possession as a criminal offense, article 3(4)(d) allows Parties to “provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.”<sup>64</sup> Therefore, Parties are still permitted, as they were under the 1961 and 1971 Conventions, to utilize methods other than incarceration to deal with those caught in possession of controlled substances for personal use.<sup>65</sup> Parties are also permitted to use more strict measures than those required by the conventions.<sup>66</sup>

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61. *See id.*

62. Although there is an exception for countries, “it would be contrary to the constitutional principles and basic concepts of their legal systems to [‘criminalize such acts’].” COMMENTARY ON THE 1988 CONVENTION, *supra* note 48, at 82–83.

63. *See id.* at 82, 87 (suggesting that alternatives to conviction or punishment stated in art. 3(4)(d) are “bridges between the criminal justice system and the treatment system[,]” and they take place within the “criminal process”).

64. 1988 Convention, *supra* note 10, art. 3(4)(d).

65. COMMENTARY ON THE 1988 CONVENTION, *supra* note 48, at 86.

66. 1988 Convention, *supra* note 10, art. 24; 1971 Convention, *supra* note 1, art. 23; 1961 Convention, *supra* note 1, art. 39.

## C. The International Prohibitionist Policy and its Effectiveness

Most Parties to the UN Drug Conventions, including the U.S., have complied with the provisions by enacting drug policies that punish the possession of controlled substances with criminal penalties.<sup>67</sup> This model of drug control has been referred to as the “prohibitionist approach.”<sup>68</sup> The UN Drug Conventions are most commonly interpreted to require the prohibitionist model of drug control, which has become a familiar and accepted norm of international law.<sup>69</sup> The prohibitionist approach can be understood as utilizing a coercive strategy to target both the supply-side and the demand-side of the illegal drug market.<sup>70</sup> On the supply side, this approach places strict criminal penalties, particularly incarceration, on those who manufacture, produce, traffic, and sell controlled substances.<sup>71</sup> On the demand side, the approach seeks to deter customers of the illegal drug market by imposing criminal penalties on those caught purchasing or in possession of controlled substances.<sup>72</sup> In most countries, a majority of drug-related arrests are for the possession of controlled substances.<sup>73</sup>

The prohibitionist model reflects a simplified interpretation and imposition of the Parties’ obligations under the conventions. Rather than provide for alternatives, such as those listed in article 3(4)(d) of the 1988 Convention, prohibitionist regimes subject offenders to the criminal justice system and treat such offenders like any other type of criminal.<sup>74</sup> This approach fails to recognize drug addicts as people with a mental health problem and also fails to distinguish drug addicts from other criminals.<sup>75</sup> Thus, criminal justice systems often impose criminal

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67. See Ford, *supra* note 2, at 201.

68. *Id.* at 200.

69. See *id.* at 202.

70. See *id.* at 205.

71. See *id.* at 201.

72. See *id.* These penalties are also imposed on those caught cultivating drugs for personal consumption (for example: growing a marijuana plant or opium poppies). 1988 Convention, *supra* note 10, art. 3(2).

73. GLOBAL ILLICIT DRUG MARKETS 1998–2007, *supra* note 4, at 44.

74. See, e.g., 21 U.S.C. § 844 (2010).

75. See UNODC WORLD DRUG REPORT 2014, *supra* note 16, at 13 (“The lack of access to and availability of health care, especially drug dependence treatment and HIV

sanctions for offenses such as illegal drug possession but rarely provide the type of adequate treatment or rehabilitation that would help the offender overcome an addiction.<sup>76</sup>

The prevailing prohibitionist drug regime has been relatively ineffective in combatting issues of drug use and drug addiction.<sup>77</sup> By 1998, a decade after the creation of the 1988 Convention, the international community acknowledged the growing global drug abuse problem.<sup>78</sup> The UN General Assembly restated its commitment to tackling the global drug problem in the 1998 UN General Assembly Special Session (UNGASS) Political Declaration.<sup>79</sup> The UNGASS envisioned 2008 as a target date to reach several drug-related goals, including demand reduction.<sup>80</sup> However, little had changed with the global drug problem by 2008.<sup>81</sup>

The United Nations Office on Drugs and Crime (UNODC) stated in its 2008 World Drug Report that the international drug regime had an unintended consequence in “the way the authorities perceive and deal with the users of illicit drugs.”<sup>82</sup> The UNODC described this unintended consequence as “[a] system . . . in which those who fall into the web of

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prevention and care services, in prisons is of major concern . . . .”); Heilmann, *supra* note 30, at 268 n.164 (“An additional problem . . . is that the framing of the narcotics problem as an issue of criminality instead of public health, and the application of ‘zero tolerance’ policies obviously make the use of regulatory tools like cost-benefit analysis difficult.”); *supra* text accompanying note 72.

76. See UNODC WORLD DRUG REPORT 2014, *supra* note 16, at 11–13; Comm’n. on Narcotic Drugs, U.N. Office on Drugs & Crime, Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy to Counter the World Drug Problem, at 23, Mar. 11–12, 2009, (Sept. 2009) [hereinafter 2009 Political Declaration], available at <http://www.unodc.org/documents/ungass2016/V0984963-English.pdf>.

77. See 2009 Political Declaration, *supra* note 76, at 2; Declaration on the Guiding Principles of Drug Demand Reduction, G.A. Res. A/S-20/4, U.N. GAOR, 20th Spec. Sess., Supp. No. 1, U.N. Doc. A/S-20/4, (June 10, 1998) [hereinafter 1998 Declaration].

78. See 1998 Declaration, *supra* note 77, ¶ 3.

79. *Id.* ¶ 7(a)–(d).

80. Heilmann, *supra* note 30, at 252.

81. Ford, *supra* note 2, at 205.

82. U.N. OFFICE ON DRUGS & CRIME, WORLD DRUG REPORT 2008, at 216, U.N. Sales No. E.08.XI.1 (2008) [hereinafter UNODC WORLD DRUG REPORT 2008].

addiction find themselves excluded and marginalized from the social mainstream, tainted with a moral stigma, and often unable to find treatment even when motivated to seek it.”<sup>83</sup> This flaw is the direct result of the strict prohibitionist approach to drug policy, as the criminal nature of drug use perpetuates the stigma associated with drug addiction.<sup>84</sup> Furthermore, those who are incarcerated for drug offenses have limited options for treating their drug addiction.<sup>85</sup>

The UNODC World Drug Reports for recent years show that the current international drug-control regime continues to have little effect on reducing the amount of drug use worldwide.<sup>86</sup> “According to the most recent data available,” the 2015 report concludes, “there has been little change in the overall global situation regarding the production, use and health consequences of illicit drugs.”<sup>87</sup> The 2014 report states, “overall the global situation with regard to the prevalence of illicit drug use and problem drug use is generally stable, with the total global number of drug users increasingly commensurate with the growth of the world population.”<sup>88</sup> While the number of illicit drug users relative to the total world population remained fairly stable during the period between 2003 and 2012, “the rate of persons arrested for or suspected of offences related to possession for personal use increased by 18 per cent.”<sup>89</sup>

Many of the world’s prisoners are incarcerated for offenses related to the use or possession of drugs. However, incarceration often exacerbates problems associated with drug addiction.<sup>90</sup> “[T]he prison environment is one in which there are limited prevention and treatment options for dealing with drug dependence and its associated health consequences.”<sup>91</sup> There is a high rate of HIV infections among prisoners, and there is also

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83. *Id.*

84. GLEN GREENWALD, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 9 (2009).

85. UNODC WORLD DRUG REPORT 2015, *supra* note 13, at 76.

86. *See id.* at 1; UNODC WORLD DRUG REPORT 2014, *supra* note 16, at ix.

87. UNODC WORLD DRUG REPORT 2015, *supra* note 13, at ix.

88. UNODC WORLD DRUG REPORT 2014, *supra* note 16, at ix.

89. *Id.* at 19.

90. *Id.* at 11–13.

91. *Id.* at 13.

a high prevalence of drug use among prison populations.<sup>92</sup> It is common for prisoners to take drugs by injection, which likely contributes to the high rate of HIV infections since prisoners have limited access to clean needles.<sup>93</sup>

The evidence presented here suggests that the prevailing prohibitionist international drug-control regime is failing to address the public health issues for which drug policies are intended to resolve. The next section explores Portugal's experience with a different type of drug policy, which has focused more on public health concerns and has succeeded in many respects where prohibitionist policies have failed.

## II. PORTUGAL'S EXPERIMENT: THE PUBLIC-HEALTH APPROACH

In 2001, Portugal decided to take a unique and creative approach to drug policy, and decriminalized the possession of small quantities of illicit drugs.<sup>94</sup> This section focuses on Portugal's unique decriminalization policy. Part A delves into Portugal's history with drugs leading up to its decision to enact the decriminalization scheme. Part B details the enactment and framework of Portugal's drug law. Part C examines the effects of Portugal's drug policy.

### A. Portugal's History with Drugs and Drug Laws

Portugal's drug laws and its stance on drug use and possession have changed several times over the past several decades. In 1926, a totalitarian government came to power in Portugal.<sup>95</sup> During most of the totalitarian rule, drug trafficking and possession were crimes, but drug use was not a criminal offense.<sup>96</sup> Portugal criminalized drug use in 1970

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92. *Id.* at 11–13.

93. *Id.* at 13.

94. Drug Policy Profiles: Portugal, *supra* note 20, at 16–17; *see also* Decreto-Lei 30/2000, *supra* note 20.

95. INEKE VAN BEUSEKOM ET AL., RAND EUR., GUIDELINES FOR IMPLEMENTING AND EVALUATING THE PORTUGUESE DRUG STRATEGY 7 (2002).

96. *Id.*

with the passage of Decreto-Lei No. 420/70 ("Decree Law No. 420/70").<sup>97</sup>

After a democratic revolution in 1974, illegal drug use suddenly became a growing problem in Portugal.<sup>98</sup> Despite government anti-drug campaigns and the creation of governmental organizations tasked with reducing drug use, the problem continued to grow.<sup>99</sup> Due in part to Portugal's location on the Southwest tip of Europe, the country became an attractive point for illegal drugs to enter the continent.<sup>100</sup>

In the 1990s, heroin use quickly became a significant problem for Portugal.<sup>101</sup> During this period, "the negative consequences of drug use became visible: heroin abuse started a social and human degradation process, involving increasing criminality, health problems of heroin addicts, and feelings of insecurity among the general population."<sup>102</sup> By 1997, heroin users comprised 95.4% of all drug users seeking treatment in Portugal.<sup>103</sup> According to the European Monitoring Center on Drugs and Drug Addiction (EMCDDA) the number of drug-related AIDS cases in Portugal rose from 0.1 per million people in 1985, to 54.7 per million in 1998.<sup>104</sup> By 1999, Portugal had the highest rate of injection drug-related AIDS cases in the European Union and the second-highest prevalence of injection drug users with HIV.<sup>105</sup> In 2000, 14% of drug users who entered public drug treatment had HIV.<sup>106</sup> Arrests for drug offenses had risen by 235% from 1990 to 1998, with most of the arrests related to heroin.<sup>107</sup> In 2000, Portugal's enforcement of drug laws cost over 100 million euros.<sup>108</sup>

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97. Decreto-Lei 420/70 [Decree Law 420/70], *Diário da República* de 3.9.1970 (Port.); DRUG POLICY PROFILES: PORTUGAL, *supra* note 20, at 10.

98. VAN BEUSEKOM ET AL., *supra* note 95, at 7.

99. *Id.* at 7–8.

100. Russoniello, *supra* note 19, at 380–81.

101. *Id.* at 381–82.

102. VAN BEUSEKOM ET AL., *supra* note 95, at 8.

103. Mirjam van het Loo et al., *Decriminalization of Drug Use in Portugal: The Development of a Policy*, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 49, 54 (2002).

104. *Id.* at 52.

105. Russoniello, *supra* note 19, at 382.

106. *Id.*

107. VAN BEUSEKOM ET AL., *supra* note 95, at 11.

108. *Id.* at xiii.



Estimates suggest that by the end of the 1990s there were between 50,000 and 100,000 drug addicts in Portugal, which had a total population of about 10 million, meaning that somewhere between 0.5 and 1% of the country's population suffered from drug addiction.<sup>109</sup> By the end of the 1990s, increasing public anxiety “culminated in the drugs issue becoming the ‘number one concern’ of Portuguese society.”<sup>110</sup> With the harmful effects of drug abuse becoming more and more prevalent, the public realized that the traditional law enforcement and treatment tactics were “inadequate responses.”<sup>111</sup> What emerged was a “paradigmatic shift in the conceptualisation of drug users—to see drug users as citizens who were sick—not criminals.”<sup>112</sup> The shifting societal view and the failure of criminal penalties to deter drug use signaled that the time had come for a new approach to the drug crisis.

#### B. Portugal's Decriminalization Strategy (Decreto-Lei 30/2000)

To address the out-of-control drug crisis, the Portuguese government created the Comissão para a Estratégia Nacional de Combate à Droga (“Commission for a National Drug Strategy,” hereinafter CNDS) to consider potential solutions.<sup>113</sup> The CNDS recommended a long-term strategy “based on prevention, harm reduction and the reintegration of drug users into society.”<sup>114</sup> In response, the Portuguese government began work on crafting a new drug policy that would incorporate those principles.<sup>115</sup> The driving idea behind the law was that drug addiction

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109. *Id.* at 10.

110. Hughes, *supra* note 12, at 103.

111. *Id.*

112. *Id.*

113. Russoniello, *supra* note 19, at 384; *see also* LAURENCE ALLEN ET AL., DRUG POLICY PROGRAMME, DECRIMINALISATION OF DRUGS IN PORTUGAL: A CURRENT OVERVIEW 2 (2004) (discussing the rise of the Portuguese legal framework and current drug use commissions like the Comissões para a Dissuasão da Toxicoddependência (Commissions for the Dissuasion of Drug Use)).

114. ALLEN ET AL., *supra* note 113, at 2.

115. Russoniello, *supra* note 19, at 384.

should be treated as a social or public health issue, rather than a criminal issue.<sup>116</sup>

On October 19, 2000, the Parliament adopted Portugal's current law on drug possession, Decreto-Lei 30/2000 ("Decree Law 30/2000"), which went into effect on July 1, 2001.<sup>117</sup> The new law decriminalized the possession of illegal substances for personal use of amounts not exceeding what the law considered to be a ten-day supply.<sup>118</sup> An individual caught in possession of illegal substances of quantities under a ten-day supply is not placed under arrest.<sup>119</sup> Instead, the police refer the individual to a Comissão para a Dissuasão da Toxicodependência ("Commission for the Dissuasion of Drug Addiction," hereinafter Dissuasion Committee) within 72 hours of the offense.<sup>120</sup> The Dissuasion Committee is charged with determining whether the offender has a drug problem.<sup>121</sup>

Each Dissuasion Committee is comprised of three people, each appointed by a Government official.<sup>122</sup> One person "must be a legal expert appointed by the Ministry of Justice[;]" the other two, which may come "from the fields of medicine, psychology, sociology, social services, or other [related] areas where expertise in drug addiction may

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116. João Castel-Branco Goulão, *Decriminalizing Possession of All Illicit Drugs*, N.Y. TIMES (Mar. 17, 2014), <http://www.nytimes.com/roomfordebate/2014/03/17/lowering-the-deadly-cost-of-drug-abuse/decriminalizing-possession-of-all-illicit-drugs>.

117. Decreto-Lei 30/2000, *supra* note 20, art. 29; *see also* DRUG POLICY PROFILES: PORTUGAL, *supra* note 20, at 16–17.

118. Decreto-Lei 30/2000, *supra* note 20, art. 2. Criminal penalties are still available for people found selling, trafficking, or possessing large amounts of illegal drugs. *See* EU COMM., *supra* note 21, ¶ 107.

119. ALLEN ET AL., *supra* note 113, at 2.

120. Decreto-Lei 30/2000, *supra* note 20, art. 5(1)–(2); *see also* ALLEN ET AL., *supra* note 113, at 2; DRUG POLICY PROFILES: PORTUGAL, *supra* note 20, at 16–17.

121. *See generally* Decreto-Lei 30/2000, *supra* note 20; *see also* DRUG POLICY PROFILES: PORTUGAL, *supra* note 20, at 16–17.

122. Decreto-Lei 30/2000, *supra* note 20, art. 7.

be found,” are appointed by the Ministry of Health.<sup>123</sup> A therapist of the offender’s choosing also takes part in the proceedings.<sup>124</sup>

If the Dissuasion Committee determines that the offender *does not* have a drug addiction, and the offender has no prior drug offenses, then the proceedings are provisionally suspended.<sup>125</sup> If the Dissuasion Committee *does* determine that the offender is an addict, then the outcome can potentially be affected by whether the offender committed prior drug offenses.<sup>126</sup> If the addict *has not* committed a prior offense, then the proceedings must be provisionally suspended if the addict voluntarily accepts to undergo treatment.<sup>127</sup> However, if the addict *has* committed a prior drug offense, then it is within the Dissuasion Committee’s discretion whether to provisionally suspend the proceedings if the offender agrees to undergo treatment or to impose sanctions.<sup>128</sup> Proceedings may not be reopened if the offender completes treatment.<sup>129</sup>

If an offender decides not to undergo treatment, or if the Dissuasion Committee decides against suspending the proceedings for an offender with prior offenses, then there are a wide variety of sanctions available that the committee may impose.<sup>130</sup> Penalties for addicts can include:

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123. Russoniello, *supra* note 19, at 386; *see also* Decreto-Lei 30/2000, *supra* note 20, art. 7.

124. Russoniello, *supra* note 19, at 387; Decreto-Lei 30/2000, *supra* note 20, art. 10.

125. Russoniello, *supra* note 19, at 387; Decreto-Lei 30/2000, *supra* note 20, art. 11(1).

126. Russoniello, *supra* note 19, at 387; Decreto-Lei 30/2000, *supra* note 20, arts. 10–15; *infra* text accompanying note 139.

127. Russoniello, *supra* note 19, at 387; Decreto-Lei 30/2000, *supra* note 20, art. 11(2).

128. Russoniello, *supra* note 19, at 387; Decreto-Lei 30/2000, *supra* note 20, art. 11(3).

129. Russoniello, *supra* note 19, at 387; Decreto-Lei 30/2000, *supra* note 20, art. 14.

130. Russoniello, *supra* note 19, at 387; Decreto-Lei 30/2000, *supra* note 20, arts. 15–17.

[I]neligibility for the practice of certain occupations requiring licenses; expulsion from certain places; prohibition on associating with certain people; restrictions on foreign travel; periodic presentation at a place indicated by the commission (usually for medical services); ineligibility for firearm licenses; seizure of objects that represent a risk to the consumer or the public or that would encourage the commission of a crime or other offense; termination of public benefits for subsidies or allowances; mandatory donation to a charitable organization; or required hours of community service.<sup>131</sup>

Penalties for non-addicts can include a mere warning, or a fine in place of or in addition to any of the penalties available for addicts.<sup>132</sup> The Dissuasion Committee uses its discretion and considers several factors to determine which penalties to apply.<sup>133</sup>

### C. The Results of Decriminalization

The overall effects of the decriminalization scheme have been beneficial.<sup>134</sup> In 2009, Glenn Greenwald of the Cato Institute published a report on his findings on the effects of the decriminalized drug policy in Portugal, which reflected surprisingly positive results.<sup>135</sup> “In almost every category of drug, and for drug usage overall, the lifetime prevalence rates in the predecriminalization era of the 1990s were *higher* than the post-decriminalization rates.”<sup>136</sup> However, the most important benefit to come from decriminalization has been the decrease in drug-related deaths. Between 1999 and 2006, there was a more than 25% decrease in the total number of drug-related deaths.<sup>137</sup> Furthermore, between 2000 and 2006, the total number of deaths caused by opiates (which includes heroin) was

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131. Russoniello, *supra* note 19, at 387 (citing Decreto-Lei 30/2000, *supra* note 20, art. 17(2)–(3)).

132. *Id.* at 386–88 (citing Decreto-Lei 30/2000, *supra* note 20, arts. 15(1), 16(1)).

133. *Id.* at 388 (citing Decreto-Lei 30/2000, *supra* note 20, art. 15(4)).

134. See GREENWALD, *supra* note 84, at 1 (“[J]udged by virtually every metric, the Portuguese decriminalization framework has been a resounding success.”); Goulão, *supra* note 116.

135. GREENWALD, *supra* note 84, at 1.

136. *Id.* at 14–15.

137. *Id.* at 17.

cut by more than half.<sup>138</sup> Additionally, “the number of people in substitution treatment leapt from 6,040 in 1999 to 14,877 in 2003, an increase of 147%.”<sup>139</sup>

More recent reports confirm the continuing success of Portugal’s drug policy.<sup>140</sup> Studies estimate that the number of Portugal’s problem drug users decreased by 50% from the early 1990s, when the number was about 100,000, to 2012, when the number had dropped to 50,000.<sup>141</sup> Estimates also suggest that the number of injecting drug users decreased more than 40% during that time period.<sup>142</sup> The total number of drug users in treatment increased more than 60%, from 23,654 in 1998 to 38,532 in 2008.<sup>143</sup> The annual number of new cases of HIV decreased between 2000 and 2008 from 907 to 267.<sup>144</sup>

João Castel-Branco Goulão, Portugal’s national drug coordinator and the chairman of the European Monitoring Center on Drugs and Drug Addiction, professed his pride in the success of his country’s drug policy by writing in the *New York Times* that, “[w]hile critics of the law warned that drug use would swell, it has not risen. We have seen significant reduction in H.I.V. infections and in overdoses, as well as a substantial increase in new patients seeking drug treatment.”<sup>145</sup> He

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138. *Id.*

139. CAITLIN HUGHES & ALEX STEVENS, *THE EFFECTS OF DECRIMINALIZATION OF DRUG USE IN PORTUGAL 2* (2007). Substitution treatment “supplies illicit drug users with a replacement drug, a prescribed medicine such as methadone or buprenorphine, which is usually administered orally in a supervised clinical setting.” Michelle Kermode et al., *Opioid Substitution Therapy in Resource-Poor Settings*, 89 BULL. WORLD HEALTH ORG. 243, 243. Substitution treatment is “effective in substantially reducing illicit opiate use, HIV risk behaviours, death from overdose and criminal activity, and financial and other stresses on drug users and their families.” *Id.*

140. See ARI ROSMARIN & NIAMH EASTWOOD, *RELEASE, A QUIET REVOLUTION: DECRIMINALISATION POLICIES IN PRACTICE ACROSS THE GLOBE* 28–30 (2012), [http://www.release.org.uk/sites/default/files/pdf/publications/Release\\_Quiet\\_Revolution\\_2013.pdf](http://www.release.org.uk/sites/default/files/pdf/publications/Release_Quiet_Revolution_2013.pdf).

141. *Id.* at 29.

142. *Id.*

143. Caitlin Elizabeth Hughes & Alex Stevens, *What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?*, 50 BRIT. J. CRIMINOLOGY 999, 1015 (2010).

144. *Id.*

145. Goulão, *supra* note 116.

attributes the success to “the commissions’ outreach, treatment programs and measures to protect users’ health.”<sup>146</sup>

Portugal’s former Prime Minister, José Sócrates, who was the architect of the decriminalization policy when he was deputy Prime Minister, has stated that the cost of the new policy has freed up a lot of time for the courts, as well as space in the prisons.<sup>147</sup> He also has claimed that the costs of “the expansions made to the treatment system were far outweighed by the savings to the criminal justice system.”<sup>148</sup> Many of the savings to the criminal justice system result from the large majority of proceedings that are suspended.<sup>149</sup>

### III. WHAT THE WORLD CAN LEARN FROM PORTUGAL’S EXPERIENCE

Portugal’s success with Decreto-Lei 30/2000 indicates that there are more effective methods for furthering the underlying policies of the UN Drug Conventions than through the criminalization of drug use and possession for personal consumption. However, the plain language of the UN Drug Conventions requires drug possession to be a criminal offense.<sup>150</sup> Even though the treaties allow Parties to use rehabilitative measures “as an alternative to conviction or punishment,”<sup>151</sup> few countries have criminal justice systems that can adequately implement such measures effectively.<sup>152</sup> Therefore, sufficient alternatives to prosecution and imprisonment remain limited.<sup>153</sup>

The international community should respond to the positive results of the approach taken in Portugal by changing how drug possession is considered under international law. This section of the Article will

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146. *Id.*

147. EU COMM., *supra* note 21, ¶ 115.

148. *Id.*

149. Russoniello, *supra* note 19, at 390 (“Of the commission rulings, eighty-five percent suspended the proceeding; fourteen percent imposed a sanction, and one percent resulted in absolution.”).

150. See 1988 Convention, *supra* note 10, art. 3(2); 1971 Convention, *supra* note 1, arts. 5, 7, 22; 1961 Convention, *supra* note 1, arts. 33, 36.

151. 1988 Convention, *supra* note 10, art. 3(4)(d).

152. See 2009 Political Declaration, *supra* note 76, at 23.

153. See *id.*

present how the international community should proceed. Part A of this section will explain why the international community should be permitted to move away from the criminalization of drug possession for personal use. Part B will discuss whether decriminalization is permitted under the current international framework. Part C will discuss how the 1988 Convention's penalty provisions should be amended.

A. Should Countries Be Allowed to Move Away from the Criminalization of Drug Possession for Personal Use?

As discussed in Section I.C. above, criminalizing drug possession has been ineffective in furthering the goals of the UN Drug Conventions. Yet, criminalized drug possession remains the prevailing drug-control strategy throughout the world.<sup>154</sup> While arrests for possession of drugs for personal use have increased worldwide, so has the number of illicit drug users.<sup>155</sup> The prevailing strategy is thus clearly failing to reduce the demand for controlled substances.

The evidence shows that there are approaches to the drug problem other than criminalized prohibition that are more effective at reducing the harm of drug abuse.<sup>156</sup> An increasing number of countries have implemented "harm reduction" reforms aimed at reducing the harm to individuals and society caused by drug abuse.<sup>157</sup> Such reforms include providing clean needles and treatment for drug addicts and reducing enforcement against and criminal sanctions for drug possession.<sup>158</sup> In

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154. See Ford, *supra* note 2, at 201.

155. UNODC WORLD DRUG REPORT 2014, *supra* note 16, at 19 (using data collected for the years 2003–2012).

156. In addition to the positive results from Portugal's drug scheme, the Netherlands has also experienced benefits from a strategy that uses prosecutorial discretion to refrain from prosecuting those found in possession of small amounts of drugs for personal use. For more information on the Dutch and other European drug strategies, see *Harm Reduction Overview for Netherlands*, EUR. MONITORING CENTRE FOR DRUGS & DRUG ADDICTION (June 3, 2015), <http://www.emcdda.europa.eu/country-data/harm-reduction/Netherlands>.

157. GLOBAL ILLICIT DRUG MARKETS 1998–2007, *supra* note 4, at 13.

158. The Netherlands and Switzerland, among others, "regard the enforcement of the criminal law as a last resort, aimed primarily at protecting the public from predatory and dangerous activities related to drug selling." *Id.*

Europe, the benefits of these types of policies have been recognized by the EMCDDA and “[h]arm reduction as a concept is now accepted as part of a balanced approach.”<sup>159</sup> Acknowledging that “[t]here are limited alternatives to prosecution and imprisonment for drug-using offenders, and treatment services within the criminal justice system are frequently inadequate,”<sup>160</sup> the UNODC issued a Political Declaration in 2009 requesting Parties to the UN Drug Conventions to “consider allowing the full implementation of drug dependence treatment and care options for offenders, in particular, when appropriate, providing treatment as an alternative to incarceration.”<sup>161</sup>

Several countries have implemented drug policies that offer alternatives to mandatory incarceration for certain drug offenses.<sup>162</sup> Probably the most notable of such practices is the use of specialized “drug courts” in some countries, including the U.S., to handle drug offenses.<sup>163</sup> Drug courts are organized under criminal justice systems in order to more effectively address problems posed by drug abuse and addiction.<sup>164</sup> These courts often place offenders into drug treatment programs, which include intense monitoring and frequent drug testing.<sup>165</sup> If the participant is able to successfully complete the drug treatment program, the criminal charges are dismissed.<sup>166</sup> But, if the participant fails to abstain from drug use, then he or she may face harsh penalties,

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159. Wolfgang Götz, *Foreword to EUROPEAN MONITORING CTR. FOR DRUGS & DRUG ADDICTION, HARM REDUCTION: EVIDENCE, IMPACTS AND CHALLENGES* 7 (Tim Rhodes & Dagmar Hedrich eds., 2010).

160. 2009 Political Declaration, *supra* note 76, at 23.

161. *Id.*

162. See e.g., James L. Nolan, Jr., *Harm Reduction and the American Difference: Drug Treatment and Problem-Solving Courts in Comparative Perspective*, 13 J. HEALTH CARE L. & POL’Y 31 (2010); Ford, *supra* note 2, at 216–22.

163. For a discussion on the “Problem-Solving” court movement see JAMES L. NOLAN, JR., *LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT* (2009).

164. Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 725 (2008).

165. *Id.*

166. *Id.* at 726.



such as fines, required community service, or jail time.<sup>167</sup> These drug courts have been praised as being a more successful alternative to the traditional criminal courts for “turning addicts into drug free, productive citizens.”<sup>168</sup> The International Narcotics Control Board (INCB) has encouraged countries to consider utilizing drug courts as an “option in addressing drug abuse and related problems.”<sup>169</sup>

However, despite the benefits of providing alternatives to imprisonment, it is difficult to integrate harm reduction and treatment services with criminal justice systems.<sup>170</sup> The EMCDDA has found that there are “tensions and contradictions inherent in providing harm reduction services (which may accept continued drug use) in criminal justice settings (that do not).”<sup>171</sup> In a scientific monograph by the EMCDDA, two such contradictions are described: 1) “the fact that criminal justice systems themselves produce harms,” and 2) “the pursuit of abstinence and the acknowledgement of continuing drug use.”<sup>172</sup> The first contradiction arises from the problems caused by an individual’s arrest or punishment,<sup>173</sup> as well as the ineffectiveness of traditional criminal penalties in reducing drug crimes.<sup>174</sup> The second contradiction is caused by the “difficult[y] for the [criminal justice] system to

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167. U.S. DEP’T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS 14 (reprint 2004) (1997), *available at* [http://www.unodc.org/documents/ungass2016/Contributions/Civil/Drug\\_Court\\_Professionals/Key\\_Components.pdf](http://www.unodc.org/documents/ungass2016/Contributions/Civil/Drug_Court_Professionals/Key_Components.pdf).

168. See Hora & Stalcup, *supra* note 164, at 765.

169. INCB REPORT 2004, *supra* note 5, ¶ 308.

170. See 2009 Political Declaration, *supra* note 76, at 23; Alex Stevens et al., *Criminal Justice Approaches to Harm Reduction in Europe*, in HARM REDUCTION: EVIDENCE, IMPACTS AND CHALLENGES, *supra* note 159, at 379, 379–82.

171. Stevens et al., *supra* note 170, at 379.

172. *Id.* at 380.

173. See Ford, *supra* note 2, at 209 (“An arrest record can lead to permanent problems such as finding employment, housing, financing for college, or admission to college.”).

174. Hora & Stalcup, *supra* note 164, at 719 (“The traditional criminal justice system . . . has been willing to arrest, adjudicate, and incarcerate drug abusers without regard to the incredibly high rates of recidivism in this population. Nearly seven in ten convicted drug offenders reoffends within three years of release from incarceration.”).

acknowledge that the people under its control continue to defy the law.”<sup>175</sup>

Because drug courts are organized under criminal justice systems, their effectiveness could be affected by these contradictions, which may cause some jurisdictions to prefer a drug policy that is more similar to Portugal’s Decreto-Lei 30/2000. Unlike in Portugal, a person found in possession of a controlled substance is subject to arrest in jurisdictions that utilize drug courts.<sup>176</sup> According to the U.S. Department of Justice, “[a]rrest can be a traumatic event in a person’s life. It creates an immediate crisis and can force substance abusing behavior into the open.”<sup>177</sup> Even if there is no conviction, record of an arrest can lead to an individual “hav[ing] trouble finding jobs or housing, gaining admission to college, receiving college loans, and otherwise living productive lives.”<sup>178</sup> Countries may wish to avoid imposing these problems on drug abusers (whose lives may already be troubled) by adopting policies that remove minor drug offenses from the criminal justice system, or otherwise do not permit arrests for minor drug offenses.

Drug courts in the U.S. have been criticized for pursuing an unrealistic approach to drug treatment.<sup>179</sup> U.S. drug courts not only expect participants to remain completely abstinent from drug use,<sup>180</sup> but they usually expect participants to also refrain from consuming alcohol

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175. Stevens et al., *supra* note 170, at 380.

176. See U.S. DEP’T OF JUSTICE, *supra* note 167, at 5 (“The period immediately after an arrest, or after apprehension for a probation violation, provides a critical window of opportunity for intervening and introducing the value of [alcohol or other drug] treatment.”); Peggy F. Hora, *A Dozen Years of Drug Treatment Courts: Uncovering Our Theoretical Foundation and the Construction of a Mainstream Paradigm*, 37 SUBSTANCE USE & MISUSE 1469, 1473 (2002) (“[D]rug treatment courts use the defendant’s arrest as an opportunity for intervention.”).

177. U.S. DEP’T OF JUSTICE, *supra* note 167, at 5.

178. Stephen B. Duke, *Cannabis Captiva: Freeing the World from Marijuana Prohibition*, 11 GEO. J. INT’L AFF. 83, 86 (2010).

179. Nolan, *supra* note 162, at 41 (“[A]t least as it concerns drug courts, the U.S. prefers a total abstinence or demand reduction approach, an orientation that practitioners in the other countries find unrealistic.”) (footnote omitted).

180. *Id.*; see U.S. DEP’T OF JUSTICE, *supra* note 167, at 13 (“Although drug courts recognize that individuals have a tendency to relapse, continuing [drug] use is not condoned.”).

because “it is commonly recognized that alcohol use frequently contributes to relapse among individuals whose primary drug of choice is not alcohol.”<sup>181</sup> Compliance is measured through frequent testing for alcohol and drugs,<sup>182</sup> and if a participant tests positive for either alcohol or drugs, he or she may face penalties for noncompliance, which could include criminal conviction and jail time.<sup>183</sup> The practice of requiring complete abstention from alcohol and drug use has not caught on with drug courts outside of the U.S., which often view a participant’s “reduced use as a success, and clients can sometimes graduate without being entirely drug-free.”<sup>184</sup>

Although court-mandated treatment may be “successful at turning addicts into drug free, productive citizens,”<sup>185</sup> such mandated treatment imposes unreasonable burdens on the non-addicted offender.<sup>186</sup> Drug courts and similar programs use “the coercive powers of the courts to mandate treatment” for drug offenders (even those charged with minor offenses).<sup>187</sup> Such programs present to the non-addicted defendant charged with a minor drug offense the option to choose the lesser of two evils: either undergo court-mandated treatment that is designed to treat addiction, or opt for regular court proceedings and risk criminal conviction and punishment.<sup>188</sup> The non-addicted defendant will probably

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181. U.S. DEP’T OF JUSTICE, *supra* note 167, at 11.

182. *Id.*

183. *Id.* at 14.

184. Nolan, *supra* note 162, at 36.

185. Hora & Stalcup, *supra* note 164, at 765.

186. See Tamar M. Meekins, “*Specialized Justice*”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 17–18 (2006); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1536 (2004) (“When the offender is not an addict or has her addiction under sufficient control such that treatment is unnecessary, then treatment simply incapacitates rather than cures.”).

187. INCB REPORT 2004, *supra* note 5, ¶ 48; see also Meekins, *supra* note 186, at 4–7 (illustrating the coercive powers of the criminal justice system to mandate treatment for a minor drug offense through a hypothetical conversation between attorney and client).

188. See Meekins, *supra* note 186, at 4–7. But see Hora & Stalcup, *supra* note 164, at 750 (arguing that drug courts provide defendants with “a true choice between therapeutic court enrollment and regular case processing”).

prefer to be placed into the court-mandated treatment in order to avoid criminal sanctions.<sup>189</sup> The non-addict then forfeits some of his or her rights in order to comply with the treatment program by submitting to judicial supervision, frequent drug testing, and regular attendance at treatment sessions.<sup>190</sup> In the U.S., the right to consume alcohol is often forfeited as well.<sup>191</sup>

Portugal has avoided many of the problems facing other criminal justice systems in implementing an effective drug policy since it enacted Decreto-Lei 30/2000. Police are not permitted to make an arrest for use or possession of drugs for personal consumption under Portugal's drug policy, but they can confiscate the drugs and refer the drug user to a Dissuasion Committee.<sup>192</sup> This practice has the benefit of preventing a drug abuser from going through the "traumatic event" of an arrest.<sup>193</sup> In Portugal, removing the power to arrest for minor drug offenses improved addicts' access to drug treatment because "[t]he most substantial barrier to offering treatment to the addict population was the addicts' fear of arrest."<sup>194</sup> Additionally, the elimination of the requirement for minor drug offenses to be tried in a criminal court also alleviated the fears of addicts who wished to seek treatment.<sup>195</sup> The alleviation of addicts' fears led to an increase in the willingness of drug abusers to seek treatment,<sup>196</sup> which may explain the reduction in drug-related deaths in Portugal.<sup>197</sup> These positive results may lead policymakers in other countries to conclude that a decriminalization model can be a "more humane and effective response[] to drug users."<sup>198</sup>

Policymakers wishing to provide sufficient treatment services for drug offenders as an alternative to incarceration may also see Portugal's

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189. See Meekins, *supra* note 186, at 17.

190. See generally U.S. DEP'T OF JUSTICE, *supra* note 167 (providing a guide to how treatment programs are conducted through U.S. drug treatment courts).

191. See *id.* at 11.

192. ALLEN ET AL., *supra* note 113, at 2.

193. See U.S. DEP'T OF JUSTICE, *supra* note 167, at 5.

194. GREENWALD, *supra* note 84, at 8.

195. *Id.* at 8–9.

196. *Id.* at 15.

197. See HUGHES & STEVENS, *supra* note 139, at 9.

198. Hughes, *supra* note 12, at 238.

decriminalization model a more efficient option than those that can be provided through criminal justice systems.<sup>199</sup> Because the determination of whether to refer an offender to treatment is made by a three-person committee that includes at least two professionals with expertise in drug addiction,<sup>200</sup> resources are better focused on providing treatment for those who can actually benefit from it.<sup>201</sup> On the other hand, alternative approaches through criminal justice systems, such as drug courts, which offer treatment in place of punishment on the basis of the offender's consent rather than a determination by experts, can lead to courts "requiring extensive treatment programs for those that may least need it."<sup>202</sup> The efficiency of Portugal's decriminalization model is also demonstrated through the Dissuasion Committees' ability to resolve cases quickly.<sup>203</sup>

The WHO recently made headlines by coming out in support of decriminalization policies.<sup>204</sup> In a report released July 2014, the WHO stated that "[c]ountries should work toward developing policies and laws that decriminalize injection and other use of drugs and, thereby, reduce incarceration."<sup>205</sup> The report also noted Portugal's success with decriminalization.<sup>206</sup>

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199. See Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?*, 2010 U. CHI. LEGAL F. 299, 325–35 (2010) (comparing Portugal's drug policy with U.S. drug courts).

200. Russoniello, *supra* note 19, at 386; Decreto-Lei 30/2000, *supra* note 20, art. 7.

201. See GREENWALD, *supra* note 84, at 10.

202. Miller, *supra* note 186, at 1575.

203. See ALLEN ET AL., *supra* note 113, at 3 ("Whereas prior to the establishment of the CDTs a process might take up to two years to reach court, decisions are now typically made within four to five weeks, and all but the most complex cases are reviewed by the Commission within three months.").

204. See Matt Ferner, *World Health Organization Calls for Decriminalizing Personal Drug Use*, HUFFINGTON POST (July 23, 2014), [http://www.huffingtonpost.com/2014/07/23/who-drug-decriminalization\\_n\\_5606609.html](http://www.huffingtonpost.com/2014/07/23/who-drug-decriminalization_n_5606609.html); T.W., *The WHO Calls for Decriminalisation*, ECONOMIST (July 17, 2014), <http://www.economist.com/blogs/newsbook/2014/07/illicit-drugs>.

205. WORLD HEALTH ORG., CONSOLIDATED GUIDELINES ON HIV PREVENTION, DIAGNOSIS, TREATMENT AND CARE FOR KEY POPULATIONS 91 (2014).

206. *Id.* at 92.

The Portuguese decriminalization model has been extensively discussed here because its accomplishments establish it as a prime example for why international law should allow countries to consider decriminalizing minor drug offenses. The success of Portugal's drug policy is dependent on the removal of criminal prosecution for the use or possession of drugs for personal consumption.<sup>207</sup> Greenwald suggests in his 2009 report, "[b]etween (a) addicts who are afraid to seek treatment due to fear of criminal penalties and (b) addicts who freely seek treatment in a decriminalized framework, the latter option is clearly preferable."<sup>208</sup> As an increasing number of countries take steps towards decriminalization,<sup>209</sup> and with the WHO now endorsing decriminalization efforts, it seems that decriminalization is becoming accepted as sound policy with the international community.

#### B. Is Decriminalization Permitted Under Current International Law?

Portugal is a Party to all three of the UN Drug Conventions.<sup>210</sup> Under Decreto-Lei 30/2000, the simple consumption, acquisition, and possession of drugs for personal use are no longer criminal offenses, as the law describes such actions as only constituting administrative offenses.<sup>211</sup> However, decriminalization of drug possession seems to violate the plain language of article 3(2) of the 1988 Convention, which states, "each Party shall adopt such measures as may be necessary to establish as a criminal offence . . . the possession, purchase or cultivation

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207. See Kreit, *supra* note 199, at 329–35 (attributing the benefits of Portugal's drug policy to placing responsibilities outside of the criminal court system).

208. GREENWALD, *supra* note 84, at 15.

209. ROSMARIN & EASTWOOD, *supra* note 140, at 11–12.

210. BUREAU FOR INT'L NARCOTICS & LAW ENFORCEMENT AFFAIRS, U.S. DEP'T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: VOLUME 1, DRUG AND CHEMICAL CONTROL, MARCH 2010, at 520 (2010); see also DRUG POLICY PROFILES: PORTUGAL, *supra* note 20, at 10–12.

211. See Russoniello, *supra* note 19, at 385; Decreto-Lei 30/2000, *supra* note 20, art. 2.

of narcotic drugs or psychotropic substances for personal consumption . . .”<sup>212</sup>

While Portuguese officials were crafting Decreto-Lei 30/2000, they were aware that tensions might arise between the decriminalization of use and possession of drugs for personal use and the country’s treaty obligations.<sup>213</sup> Thus, they were careful to craft the new drug policy in a manner that they believed conformed to the UN Drug Conventions.<sup>214</sup> The Portuguese officials believed that replacing the existing criminal sanctions for minor drug offenses with administrative regulations satisfied the treaty obligations.<sup>215</sup>

The International Narcotics Control Board (INCB), which is the body tasked with monitoring the Parties’ compliance with the UN Drug Conventions,<sup>216</sup> did not hold the same view as the Portuguese officials towards decriminalization at that time.<sup>217</sup> In a report published in 2000, the INCB alleged that removing criminal sanctions for possession of drugs was “not in line with the international drug control treaties.”<sup>218</sup> After Decreto-Lei 30/2000 became effective in 2001, the INCB criticized Portugal’s policy in its annual report, and reiterated that the 1988 Convention requires possession to be a criminal offense under the Parties’ domestic law.<sup>219</sup>

In 2004, the INCB’s opposition seemed to soften.<sup>220</sup> In April of 2004, the INCB sent a mission to visit Portugal and examine the country’s drug policy.<sup>221</sup> The INCB “examined the legal framework” of Decreto-Lei

212. 1988 Convention, *supra* note 10, art. 3(2).

213. Russoniello, *supra* note 19, at 388.

214. DAVE BEWLEY-TAYLOR & MARTIN JELSMAN, TRANSNATIONAL INST., THE UN DRUG CONTROL CONVENTIONS: LIMITS OF LATITUDE 7 (2012).

215. *Id.*

216. 1988 Convention, *supra* note 10, arts. 22–23; 1971 Convention, *supra* note 1, arts. 18–19; 1961 Convention, *supra* note 1, arts. 14–15.

217. See REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 1999, ¶ 449, U.N. Doc. E/INCB/1999/1, U.N. Sales No. E.00.XI.1 (2000) [hereinafter INCB REPORT 1999].

218. *Id.*

219. REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2001, ¶ 509, U.N. Doc. E/INCB/2001/1, U.N. Sales No. E.02.XI.1 (2002).

220. See INCB REPORT 2004, *supra* note 5, ¶ 538.

221. *Id.*

30/2000, and “noted that the acquisition, possession and abuse of drugs had remained prohibited.”<sup>222</sup> In its annual report for 2004, the INCB proclaimed, “the practice of exempting small quantities of drugs from criminal prosecution is consistent with the international drug control treaties.”<sup>223</sup> Despite the more positive view of Portugal’s drug policy, the INCB seemed to remain a little skeptical by “call[ing] on the Government of Portugal to examine ways in which the commissions for the dissuasion of drug abuse can contribute towards preventing drug abuse.”<sup>224</sup>

The INCB sent another mission to Portugal in 2012 to evaluate the country’s compliance with the treaty obligations.<sup>225</sup> The INCB’s annual report for that year fully embraced Portugal’s drug policy.<sup>226</sup> It acknowledged that Portugal’s “drug control strategy is clearly defined and is implemented through a comprehensive national plan,” and “[t]he Government regularly evaluates the effectiveness of its drug control efforts.”<sup>227</sup> The INCB’s report also concluded that Portugal is “fully committed to the objectives of [the drug control] treaties.”<sup>228</sup> Therefore, the INCB accepted Portugal’s drug policy as being in compliance with the UN Drug Conventions.

### C. Should Article 3 of the 1988 Convention be Amended?

The INCB’s acceptance of Portugal’s drug policy in the 2012 report seems to indicate that Parties to the UN Drug Conventions may implement certain decriminalization measures without violating international law. Nevertheless, approving decriminalization under the current legal framework relies on legal loopholes in the Conventions.<sup>229</sup>

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222. *Id.*

223. *Id.*

224. *Id.*

225. REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2012, ¶ 113, U.N. Doc. E/INCB/2012/1, U.N. Sales No. E.13.XI.1 (2013).

226. *Id.* ¶¶ 113–17.

227. *Id.* ¶ 113.

228. *Id.*

229. For a detailed discussion on how article 3(2) may be interpreted to permit Parties to decriminalize drug possession, see BEWLEY-TAYLOR & JELSMA, *supra* note



Moreover, the INCB has been inconsistent in its approval of decriminalization of drug possession for personal use.<sup>230</sup> Portugal is not the only country to be affected by this inconsistency.<sup>231</sup> As more countries are considering decriminalization,<sup>232</sup> it is becoming increasingly important that international law takes a clear and consistent stance towards such policies.

In order to clear up the confusion surrounding the legality of decriminalization under international law, an amendment to article 3(2) of the 1988 Convention should be proposed. Under article 31 of the 1988 Convention, any Party may propose an amendment.<sup>233</sup> The Secretary-General will then communicate the text of the proposed amendment to the other Parties and “ask them whether they accept the proposed amendment.”<sup>234</sup> If no Party rejects the amendment within two years, then the amendment is “deemed to have been accepted and shall enter into force” with respect to a Party ninety days after that Party has expressed its consent to be bound by the amendment.<sup>235</sup> If any Party rejects the

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214, at 5–9; *see also* UNODC WORLD DRUG REPORT 2008, *supra* note 82, at 208 (“The Commentary to the 1988 Convention . . . notes the legal loopholes that could be used by countries which oppose making the possession of drugs for personal use a criminal offence.”).

230. *See* BEWLEY-TAYLOR & JELSMA, *supra* note 214, at 6–8. *Compare* INCB REPORT 1999, *supra* note 217, ¶ 449 (stating that Portugal’s plan to remove possession of drugs for personal use as a criminal offense was “not in line with the international drug control treaties, which require . . . States parties make drug possession a criminal offence”) *with* INCB REPORT 2004, *supra* note 5, ¶ 538 (“[T]he practice of exempting small quantities of drugs from criminal prosecution is consistent with the international drug control treaties.”).

231. In the INCB’s 2004 Report, it stated that “the practice of exempting small quantities of drugs from criminal prosecution is consistent with the international drug control treaties.” INCB REPORT 2004, *supra* note 5, ¶ 538. However, the INCB expressed concern in its 2009 Report over “a growing movement” in Argentina, Brazil, Colombia, Mexico, and the United States, “to decriminalize the possession of controlled drugs, in particular cannabis, for personal use.” REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2009, ¶ 453, U.N. Doc. E/INCB/2009/1, U.N. Sales No. E.10.XI.1 (2010) [hereinafter INCB REPORT 2009].

232. *See* ROSMARIN & EASTWOOD, *supra* note 140, at 11.

233. 1988 Convention, *supra* note 10, art. 31.

234. *Id.* art. 31(1).

235. *Id.*

proposed amendment, then “the Secretary-General shall consult with the Parties and, if a majority so requests,”<sup>236</sup> the Economic and Social Council of the UN may call a conference to discuss the matter.<sup>237</sup> “Any amendment resulting from such a conference shall be embodied in a Protocol of Amendment”<sup>238</sup> and become binding on a country upon its expressed consent.<sup>239</sup>

For the sake of clarifying the legal status of decriminalization of possession for personal consumption under the 1988 Convention, only a minor change in the language of article 3(2) is needed. For example, the word “shall” could be replaced with “may,” which would cause the provision to read, “Subject to its constitutional principles and the basic concepts of its legal system, each Party may adopt such measures as may be necessary to establish as a criminal offence . . . .”<sup>240</sup>

Another option, which may be more in line with the purpose of the conventions, is to replace the words “establish as a criminal offence” with merely the word “prohibit.” The provision would thus read, “each Party shall adopt such measures as may be necessary to prohibit under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption . . . .” This language would accomplish the objective of prohibiting the possession and consumption of drugs for non-medical or non-scientific purposes, while simultaneously giving countries considerable discretion in determining how to handle minor drug offenses.

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236. *Id.* art. 31(2).

237. *Id.*; *see also* U.N. Charter art. 62, para. 4 (“[The Economic and Social Council] may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.”).

238. 1988 Convention, *supra* note 10, art. 31(2).

239. *Id.*

240. Melissa T. Aoyagi, in a Note that she wrote for the New York University Journal of International Law and Politics, proposed this amendment as an option. Melissa T. Aoyagi, *Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy*, 37 N.Y.U. J. INT’L L. & POL. 555, 609 (2005).

## CONCLUSION

Portugal is not the only country to decriminalize minor drug offenses,<sup>241</sup> but its significant and continuing success with decriminalization stands as a strong testament for why international law should permit countries to move away from the criminalization of minor drug offenses. “Contrary to predictions, major increases in drug use did not take place; instead, evidence indicated reductions in problematic use, drug-related harms and overcrowding of the criminal justice system.”<sup>242</sup> On the other hand, the prevailing strategy of criminalizing drug possession has been ineffective, as arrests continue to increase without there being any significant impact on the prevalence of drug use.<sup>243</sup> Although some jurisdictions provide treatment programs through their criminal justice systems as an alternative to criminal sanctions,<sup>244</sup> the efficiency and effectiveness of such policies suffer from problems arising out of their administration by criminal courts.<sup>245</sup> Portugal’s drug scheme demonstrates that institutions outside of the traditional criminal justice system may be able to handle cases of minor drug offenses more effectively.<sup>246</sup>

However, whether decriminalization of minor drug offenses is permitted under international law, remains unclear. The INCB’s approval of decriminalization policies has been inconsistent,<sup>247</sup> and different interpretations of the UN Drug Conventions have led to opposite conclusions.<sup>248</sup> In the face of this uncertainty, calls for decriminalization

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241. For a report discussing decriminalization policies taken by other countries see ROSMARIN & EASTWOOD, *supra* note 140.

242. WORLD HEALTH ORG., *supra* note 205, at 92.

243. See UNODC WORLD DRUG REPORT 2014, *supra* note 16, at 19 (analyzing data collected for the years 2003–2012).

244. See generally NOLAN, *supra* note 163 (tracing the development of drug courts in the United States and abroad).

245. See generally Kreit, *supra* note 199 (discussing problems with drug courts being administered by a criminal court system as opposed to a civil court system).

246. See *id.* at 325–29.

247. See *supra* text accompanying notes 230–31.

248. Hughes, *supra* note 12, at 94 (“There is debate as to whether [the 1988 Convention] mandates all signatory bodies to criminalise drug possession for personal use.”).

continue to increase as more people recognize the failures of the prohibitionist approach.<sup>249</sup> There is now growing consideration among national governments and international bodies for drug policy reform.<sup>250</sup> International law should allow governments more freedom to pursue effective drug policies, including decriminalization of minor drug offenses; and the text of the 1988 Convention should be amended in order to clearly permit such policies.

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249. See ROSMARIN & EASTWOOD, *supra* note 140, at 11; INCB REPORT 2009, *supra* note 231, ¶ 453 (acknowledging “a growing movement” in Argentina, Brazil, Colombia, Mexico, and the United States, “to decriminalize the possession of controlled drugs, in particular cannabis, for personal use”); Nick Clegg *Makes Drug Law Election Pledge*, BBC NEWS (Mar. 4, 2015), <http://www.bbc.com/news/uk-politics-31716217>.

250. In 2012, the presidents of Colombia, Guatemala, and Mexico requested that the UN host an international meeting on drug policy reform. *The UN General Assembly Special Session on Drugs (UNGASS) 2016*, INT’L DRUG POLICY CONSORTIUM, <http://idpc.net/policy-advocacy/the-un-general-assembly-special-session-on-drugs-ungass-2016> (last visited Mar. 14, 2016). In response, the UN General Assembly passed a resolution agreeing to hold a special session to consider the world drug problem. *Id.*; see also G.A. Res. 67/193, ¶ 44, U.N. Doc. A/RES/63/193 (Dec. 20, 2012). This special session is expected to take place in April 2016. G.A. Res. 70/181, ¶ 2, U.N. Doc. A/RES/70/181 (Dec. 17, 2015).